No. 78-945

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOROUGH OF ELLWOOD CITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioner, a Pennsylvania municipality that has purchased electric power for many years from respondent Pennsylvania Power Company, contends that the Federal Power Commission [1] erred in failing to order Penn Power to refund $312,000 to petitioner

[1] The Federal Energy Regulatory Commission has succeeded to the responsibilities of the former Federal Power Commission in this case under the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565. In this brief, "Commission" refers to either body as required by the context.

for alleged overcharges from 1939 to 1964 in sales of power that this Court in 1964 held were subject to the Commission's jurisdiction.

1. In 1935 Penn Power entered into a five-year contract to sell electricity to petitioner that was generated by a Penn Power affiliate in Ohio. In 1938, at the Commission's request, Penn Power filed that contract and a corresponding rate schedule with the Commission. The filing was required by the Commission because at that time all of the power sold to petitioner was from out-of-state and because Section 205(c) of the Federal Power Act, 16 U.S.C. 824d(c), requires utilities selling electricity at wholesale in interstate commerce to file their rates and contracts with the Commission.

In 1939 Penn Power began operating plants in Pennsylvania that produced enough power to furnish all of the electricity sold by Penn Power at wholesale to municipalities in Pennsylvania. However it continued to obtain some of its power from its Ohio affiliate. From 1939 to 1964 Penn Power assumed that the sales to petitioner were no longer subject to the Commission's jurisdiction, and accordingly filed all of its subsequent rate schedules and changes with the Pennsylvania Public Utilities Commission rather than with the Commission. Petitioner apparently shared that assumption, since it never complained of Penn Power's rates until it commenced this action in 1966.

In 1964 this Court in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (*Colton*), held that sales

of electricity at wholesale that occur entirely within a state are subject to the regulatory requirements of the Federal Power Act if some of the energy, even a small part, comes from out-of-state.

Following the *Colton* decision, the Commission issued a policy statement, Order No. 282, 31 F.P.C. 972 (1964), advising utilities in Penn Power's situation that if they filed appropriate rate schedules with the Commission by August 1, 1964, it would treat such filings as initial rate schedules, subject to Section 205(c) (rather than as changes in existing rates) and that "it does not intend on its own motion to initiate any inquiry into past failures to file such schedules" (Pet. App. 27a). The Commission cautioned, however, that its policy was to be without prejudice to the possible rights of interested third parties. *Ibid.*

Like many other utilities, Penn Power filed with the Commission the schedules it had previously filed with its state regulatory commission. The Commission accepted Penn Power's then current schedules for filing effective as of September 3, 1964 (Pet. App. 2a-3a).

2. In 1966 petitioner complained to the Commission that the only lawful rates in effect from 1939 to 1964 were those set forth in the contract and rate schedule Penn Power had filed with the Commission in 1938, and demanded refunds for the difference between those rates and the rate actually charged during that period. Petitioner based its claim on Section 205(c) of the Federal Power Act, 16 U.S.C.

824d(c), which requires the filing of rate schedules for jurisdictional sales, and on Section 205(d), 16 U.S.C. 824d(d), which provides "[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rate * * * except after thirty days' notice to the Commission and to the public." Petitioner also relied generally on the "filed rate doctrine," which those sections reflect, under which utilities and their customers "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *North-Western Public Service Co.*, 341 U.S. 246, 251 (1951).

After a hearing before an administrative law judge, who entered an initial decision rejecting petitioner's claims (Pet. App. 1a-15a), the Commission held that it had discretion to refuse to order a refund in the circumstances, and that the equities of the case warranted denial of Ellwood's claim (Pet. App. 16a-22a). The court of appeals affirmed in a thorough opinion on which we primarily rely (Pet. App. 23a-38a).

3. The court of appeals correctly rejected petitioner's claims that the filed rate doctrine required the Commission to order refunds in the unique circumstances of this case.

This case involves the situation that arises from time to time in which a judicial decision establishes an agency's jurisdiction over transactions that were

reasonably thought to be exempt from jurisdiction before the decision.[2] Petitioner does not dispute that from 1939 to 1964 Penn Power reasonably believed that its sales to petitioner were not subject to Commission jurisdiction (Pet. 8). It is true that in 1938 Penn Power filed its rate schedules with the Commission because it was then furnishing electricity obtained from out-of-state. But in 1939 it (and petitioner) reasonably believed that its sales ceased to be within the Commission's jurisdiction because all of the power sufficient to meet petitioner's needs was generated within Pennsylvania.

The purposes of the "filed rate doctrine" on which petitioner relies do not apply to the rather unusual situation in which jurisdiction over transactions is subsequently recognized in a judicial decision. Rather,

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[2] In those situations the Commission has, as it did here, adopted policies forgiving past failures to file if regulated companies promptly complied with the law as clarified. See, *e.g.*, Order Nos. 174 and 174-A, 13 F.P.C. 1195, 1410 (1954), implementing this Court's decision holding that producers' sales of natural gas in interstate commerce were subject to the Natural Gas Act (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954)); *Hugoton Production Co.*, 41 F.P.C. 490 (1969), implementing this Court's holding that local gas commingled in the interstate stream is subject to the Commission's jurisdiction even if sold locally (*California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965)); *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), affirming the Commission's decision to predate hydroelectric licenses applied for under a 1962 Commission ruling (*Public Service Co. of New Hampshire*, 27 F.P.C. 830) that existing hydroelectric projects on streams usable for log transport require licenses under Part I of the Federal Power Act.

that doctrine and all of the cases cited by petitioner applying it pertain to transactions over which an agency's regulation was always recognized. Under that doctrine, for example, if a railroad files a tariff with the Interstate Commerce Commission and subsequently contracts to carry freight at higher rates without filing a new tariff, the shipper may obtain a refund of the charges in excess of the filed rate, even if the higher rates were negotiated at the shipper's instigation and even if they were just and reasonable. Although it may be harsh in some cases, the courts have held that that result is required by the policy of the statute, which would be thwarted if parties could circumvent statutory procedures unilaterally or by private agreement.

The objectives of the Federal Power Act, or similar statutes, do not require application of the filed rate doctrine when, as here, a change in law establishes jurisdiction over the transactions after the fact. In such circumstances, the court of appeals correctly held that an agency has discretion to hold that the previous failure of utilities to make appropriate filings does not require sanctions or refunds;[3]

[3] Imposing sanctions or refunds retroactively to transactions that were legally outside the Commission's jurisdiction at the time (or reasonably believed to be so) would not serve the statutory purpose of preventing persons from circumventing statutory procedures unilaterally or by private agreement. Nor would it serve the basic purpose of Part II of the Federal Power Act of ensuring just and reasonable rates to the consumer, since there is no reason to suppose that the Commission would have rejected the schedules that Penn Power filed

nor does petitioner appear to question that principle. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), noting the Commission's discretion "to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."

Contrary to petitioner's contention, however, the happenstance that Penn Power had filed a rate schedule in 1938 is immaterial and does not require a different result. Penn Power did not file any schedules with the Commission after 1939 (to either change or cancel its schedule filed in 1938) because it reasonably believed that its sales after 1939 were not subject to the Commission's jurisdiction and were subject only to the jurisdiction of the state commis-

with the state commission and since, during this period, the state commission did exercise regulatory jurisdiction over the rates. In some cases, it may be necessary to give retroactive application to a change in law. See generally *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380, 388-391 (D.C. Cir. 1972). But the Commission was well within its discretion in concluding that the purpose served by the filed rate doctrine—ensuring compliance with statutory procedures—did not require refunds in the circumstances of this case.

The circumstances of this case, in which a judicial decision can be viewed as changing the law and expanding the Commission's jurisdiction over transactions that were reasonably thought to be exempt from jurisdiction, are quite different from cases in which a person's failure to act as the statute requires is assertedly based on an ordinary mistake of fact or law. If a railroad, for example, charges rates in excess of its filed rate, it is no defense that it mistakenly believed that it was not required to file a tariff for the higher rates, or that it believed that the Interstate Commerce Commission would have approved such a higher tariff if it had been filed.

sion. It was thus in the same situation as any other utility during the period 1939-1964 making the same kind of sales that had never filed a tariff with the Commission. The Commission had discretion to hold that Penn Power, like such other utilities, was not required to pay refunds because of its reasonable, though subsequently rejected, belief that its sales were not within the Commission's jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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